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September 2, 2011

Art Carter, Chair
Occupational Safety & Health Appeals Board
2520 Venture Oaks Way #300
Sacramento, CA 95833

Via facsimile (916) 274-5786

**Re: Comments on proposed OSHAB regulations noticed for hearing
on September 6, 2011**

Dear Mr. Carter and Members of the Occupational Safety & Health Appeals Board,

On behalf of workers in California whose employers appeal citations when those workers are exposed to unsafe and unhealthful conditions and whose employers may also be subject to criminal prosecution for offenses based on such citations, we wish to object to the proposed changes in the regulation which is before you for consideration on September 6, 2011. These comments only address Section 376 (c) and are not to be considered as indicating agreement with or opposition to other portions of the proposed regulations.

Our firm is a nationally recognized plaintiffs' asbestos law firm located in Oakland, CA. Our particular expertise is representing victims of asbestos-related disease, including mesothelioma, but we allocate substantial resources to preventing occupational safety and health injuries and illnesses in our pro bono work through legislative, regulatory and policy advocacy, and impact litigation. We represent workers who are or may be affected by the proposed regulation about which we are commenting.

I have particular expertise with respect to the criminal prosecution of occupational safety and health cases in that I previously directed the Bureau of Investigations [BOI or Bureau] of the Division of Occupational Safety and Health [Division or Cal/OSHA] from 1980 to 1984. In that role I expanded the function of the Bureau to include the criminal prosecution of "health" cases, increased overall the number of safety and health matters that were prosecuted criminally, and worked closely with prosecutors throughout California to facilitate those criminal prosecutions. I continue to work with local prosecutors and with families who wish to bring certain cases to the attention of a prosecutor.

The proposed amendment is too narrow and does not accomplish what is needed. The Initial Statement of Reasons states that the "amendment is needed because the statute of limitations for charging an employer with criminal conduct that can result in imprisonment in the state prison is three years, so the two years specified in the regulation is insufficient to allow a criminal prosecution to be commenced prior to the administrative hearing." But this is not the only reason for amending this section.

We acknowledge that any amendment of this section needs to account for the fact that in 1999 it became possible to prosecute an occupational safety and health crime as a felony pursuant to Labor Code § 6425. Previous Labor Code violations for such crimes were misdemeanors with a one-year statute of limitations; the statute of limitations for a felony is three years and the regulation had not been changed to take that into account.

However, the worker advocate petitioners believe that additional changes are required for Section 376 (c) because the criminal case must be considered more significant than the administrative case. Further, control of the criminal case must be with the prosecuting authority and not solely with the employer, or even jointly controlled by the employer and the Division of Occupational Safety and Health.

The language proposed in Section 376 (c) reads:

(c) In cases being reviewed by the Bureau of Investigations or any prosecuting authority, unless the employer submits a written request that its appeal go forward in the normal course, the Appeals Board shall delay the hearing until the conclusion of a review of the case by the Bureau of Investigations or any prosecuting authority or for a period not exceeding 2 three years, whichever occurs earlier. The period may be extended beyond 2 three years at a party's request if necessary to allow the Bureau of Investigations or any prosecuting authority to conclude its review of the case.

This language is objectionable for several reasons.

First, by including the phrase "unless the employer submits a written request that its appeal go forward in the normal course," it appears that a case may proceed despite an objection by the Division or the prosecuting authority. This will not further the interests of justice in that if the employer / criminal defendant can require the administrative hearing to proceed, the employer / criminal defendant may be able to use such to discover the prosecutor's case (by requiring the Division present testimonial and documentary evidence). Criminal prosecutors are not required to submit their witnesses to depositions and the administrative hearing would allow the employer / criminal defendant, in essence, to depose potential witnesses. This also provides the employer / criminal defendant with testimony that may ultimately bear on the credibility of the witness that the Division presents or that the employer / criminal defendant chooses to present as such may constitute prior inconsistent statements. This approach overall inappropriately takes the presentation of the case away from the prosecuting authority and leaves it in the control of the employer / criminal defendant. The criminal case should take precedence over an administrative proceeding.

Second, there is nothing in the regulation that requires the Appeals Board to delay the hearing when a case is actually being criminally prosecuted (after a complaint or indictment is lodged). The proposed regulatory language only addresses the review stage of the case. This again takes away the control that should reside with the prosecuting authority, which is particularly critical after a complaint or indictment.

Third, by including the phrase "until the conclusion of a review of the case by the Bureau of Investigations or any prosecuting authority or for a period not exceeding three years, whichever occurs earlier," it appears that the mandated delay of the administrative hearing will end upon the completion of the BOI investigation. This doesn't allow the prosecuting authority any additional time to complete its own investigation. This eliminates the ability of the prosecutor to conduct a thorough review of the case to determine whether to file criminal charges, and ignores the precedence that the criminal case should have over the administrative matter.

Fourth, although the proposed regulation allows the Board to grant an additional continuance beyond the shorter period of the completion of the BOI investigation or a period of three years (the prosecuting authority generally won't begin its own investigation until it receives the BOI report so that language is not of any import), for such discretionary additional delay of the administrative hearing, it is only a "party" that may make such a request. The current regulation does not provide a way for a prosecuting authority to become a party and so once more, control of the major case, the criminal matter, is removed from the prosecutor.

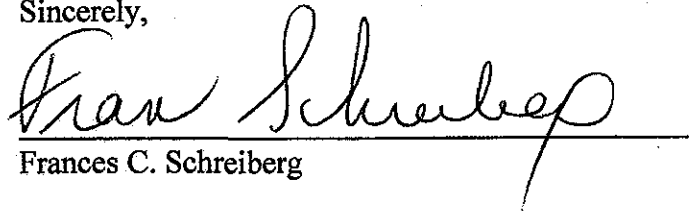
Below is a proposed revision to the language which will more effectively achieve the goal sought by the worker advocates who petitioned for a change in this regulation:

(c) Whenever a case is within the jurisdiction of ~~In cases being reviewed by~~ the Bureau of Investigations or is being actively investigated or prosecuted by ~~any prosecuting authority, unless the employer submits a written request that its appeal go forward in the normal course,~~ the Appeals Board shall delay the hearing, upon the written request of the division, employer, or any prosecuting attorney with jurisdiction over the case, until the conclusion of a review of the case by the Bureau of Investigations ~~or and for one additional year after the completion of the review of the case by the Bureau of Investigations for the review of such matter by any prosecuting authority who indicates in the written request that such additional time is needed. Such delay shall not automatically exceed the completion of the review by the prosecuting authority~~ or for a period not exceeding 2 ~~three~~ years, whichever occurs earlier. The period may be extended beyond 2 ~~three~~ years at a party's request or at the request of any prosecuting authority if necessary to allow the Bureau of Investigations or any prosecuting authority to conclude its review of the case. If the prosecuting authority has filed the case, the hearing shall be delayed until the completion of the criminal case which shall be deemed to occur on the date of a verdict of not guilty, a dismissal of the case by a court, or the date of sentencing after a verdict or plea of guilty or no contest.

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Based upon the foregoing, we respectfully request that the regulatory proposal be revised to reflect these changes we have proposed. In the alternative, we request that this matter be continued for an additional period in order to solicit information from additional prosecuting authorities in California, including the new Attorney General, who have not been involved in developing the current regulatory proposal.

Sincerely,

A handwritten signature in cursive script, reading "Frances Schreiberg", written over a horizontal line.

Frances C. Schreiberg

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